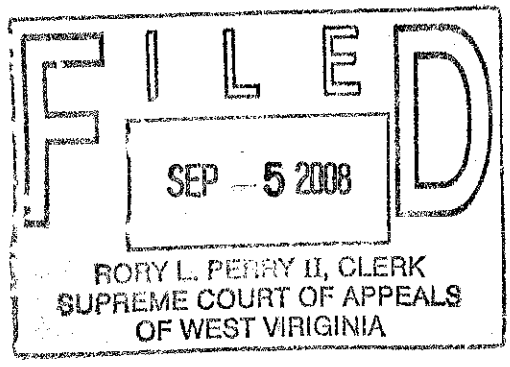
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34156



FREDA RATLIFF,
Executrix of the Estate of
Sparrel Ratliff, Deceased,

APPELLANT

v.

NORFOLK SOUTHERN RAILWAY COMPANY

APPELLEE.

BRIEF ON BEHALF OF FREDA RATLIFF

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I. TYPE OF PROCEEDING AND NATURE OF LOWER TRIBUNAL DECISION

This is a case of first impression before the Supreme Court of Appeals of West Virginia, involving an interpretation of 45 U.S.C. § 55; the provision of the Federal Employers Liability Act (FELA) which prohibits broad "exemption from liability" devices/releases. Both the Third and Sixth Federal Circuit Court of Appeals, and other state appeal courts, have ruled that 45 U.S.C. § 55 prohibits the broad release language the trial court relied on in granting Norfolk Southern Railway Co.'s [hereinafter "NS"] motion for summary judgment (*See* A-4, infra).

The Appellant commenced the underlying action on October 31, 2005, for the benefit of her decedent's wrongful death beneficiaries, to recover damages incurred as a result of Sparrel Ratliff's development of and subsequent death from mesothelioma; contracted as a result of his occupational exposure to asbestos-containing products as a NS locomotive engineer. On September 19, 2007, the trial court granted summary judgment in favor of the appellee, NS. The trial Court ruled that a 1986 early retirement agreement containing a general release provision between the Appellant's decedent and NS bars the present action. It is this decision that the Appellant appeals from; respectfully requesting reversal of the trial Court's entry of summary judgment in favor of NS, and find, as a matter of law, that the subject release is void as to the Appellant's mesothelioma claims.

II. STATEMENT OF FACTS

Sparrel Ratliff, Jr. was born August 26, 1926, and in 1947, at age twenty-three, went to work for Norfolk & Western Railway Company [hereinafter, "N&W"], a predecessor entity of NS [R.241: *Ratliff Deposition II* (June 14, 2005) at 2; R.114-160: *Kirchner Deposition*, exhibit 3]. He worked for N&W as a locomotive engineer for nearly 40 years, until his retirement in 1986. [R.114-160: *Kirchner Deposition*, exhibit 3]. He worked on steam locomotives in numerous counties in West Virginia during the 1940's, 1950's and 1960's. [R.379: *Smith Deposition*, at 23:17- 25, 24:1-25]. Ratliff described asbestos coverings on both engine boilers and steam lines and said asbestos often looked white but would turn black from use. [R.243: *Ratliff Deposition II*, (June 14, 2005) at 26:3-15]. Ratliff received no instruction or training about handling asbestos, he was never warned about the hazards of asbestos, and he was never provided with any respiratory protection. [R.243-244: *Ratliff Deposition II* at 26: 24-27:11].

In April 2005, 19 years after his retirement from the railroad, Ratliff was diagnosed with mesothelioma. [R.63-64: *Freda Ratliff Affidavit* at 1-2]. He died from mesothelioma in July 2005.

In 1986, NS sent its engineers including Ratliff, several documents explaining a voluntary separation or early retirement program. An October 13, 1986 letter addressed to "Train and Engine Service Employees," outlined the "voluntary separation program of participating rail carrier subsidiaries of NS. NS also drafted a "resignation and release" document that was signed by Ratliff. [R.123: *Kirchner Deposition*, at 10:5-24]. These documents, specifically the "resignation and release," are the focus of this controversy.

Marcellus Kirchner was the NS Director of Labor Relations in 1986. [R.119: *Kirchner Deposition* at 6:13-15]. According to Kirchner, the early retirement separation plan was designed

to pay a lump sum of money to engineers like Ratliff, in order to eliminate redundant positions and to replace existing employees with lower compensated employees. [R.139: *Kirchner Deposition*, at 26:16-19].

In 1986, Ratliff had no pending injury or disease claim against the railroad. [R.63: *Freda Ratliff Affidavit* at 1; R.196: Hearing transcript of June 15, 2007 at 5:3-5; R.131-132: *Kirchner Deposition* at 18:25-19:11.]. Further, there is no evidence that Ratliff was represented by an attorney or had legal advice before signing the separation agreement. [R.196: Hearing transcript of June 15, 2007 at 5:12-19; R.125: *Kirchner Deposition* at 12:17-23]. Moreover, there is no evidence that Ratliff or NS knew or contemplated that Ratliff had an asbestos or mesothelioma claim when the agreement was signed. [R.131-132: *Kirchner Deposition* at 18:25 -19:11; R.63-64: *Freda Ratliff Affidavit* at 1-2.]. In fact, the letters describing the early retirement program, as well as the separation agreement executed by Ratliff, do not contain any reference to injury claims, claims arising under the FELA, asbestos claims, mesothelioma claims, or any relinquishment of his rights under the FELA. [R.127-128: *Kirchner Deposition* at 14:13-15:18]. In addition, it is noteworthy that NS withheld federal and state taxes from the $35,000.00 paid to Ratliff for this early separation agreement. [R.123-124: *Kirchner Deposition* at 10:25-11:11.]; *compare* Internal Revenue Code § 104 (excluding personal injury awards from gross income). Indeed, the withholding of taxes was based on the full $35,000.00, not on some lesser portion. [R.126: *Kirchner Deposition* at 13:9-14].

In pertinent part, the separation agreement states:

> I, S. Ratliff, Jr., 227-22-2118, in consideration of the sum of THIRTY-FIVE THOUSAND DOLLARS ($35,000.00), the receipt of which is hereby acknowledged, hereby resign and surrender any right to employment by [NS] . . . and hereby release and forever discharge the Company from any claim (with the exception of vested pension rights), demand, action or cause of action, of any kind whatsoever, known or

> unknown, which I have or could have on account of, or in any manner arising out of or connected with, my employment by the said Company, or the termination there of, including but not limited to any claim or right asserted under or arising out of any agreement, regulation, condition or statute affording the employment protection, protecting me from employment or covering the conditions of my employment.
>
> * * *
>
> I also hereby authorize the Company to withhold from the aforesaid sum and pay over to the Internal Revenue Services on my behalf...to withhold and pay over to . . . the further sum of $7,000.00 for the purpose of complying with the withholding tax provisions of the Internal Revenue Code, and to withhold and pay over to the State of Virginia the further sum of $2,012.50 for the purpose of complying with the withholding tax provisions of the laws of said State.
>
> This resignation and release and the deductions authorized herein are fully understood by me. This document is executed voluntarily and solely for the consideration above expressed, without any other representation, promise, or agreement of any kind whatsoever having been made or offered to me by the Company or any agent, employee, or representative of the said Company.
>
> Given under my hand and sealed this 12th day of December, 1986.
>
> Signed [Sparrel Ratliff Jr.]

NS now asserts that its intent was to bar all future worker claims, actions or suits including FELA liability. [R.142-144: *Kirchner Deposition* at 29:17-30:5.]. However, workers like Ratliff were intentionally left in the dark as to NS's intent because, as Kirchner testified, it would have been "cumbersome" for NS to include extensive specific release language expressly mentioning the "FELA" and/or "personal injuries." [R.145: *Kirchner Deposition* at 32:10-24.].

Retired engineer Harry Smith, who worked with Ratliff, testified that he also was unrepresented when he signed his early retirement release with NS in 1987. [R.374-375: *Smith Deposition* at 5:18-6:10]. He too never knew that asbestos could cause mesothelioma cancer before he signed his 1987 early retirement release papers, and NS never provided him with any paperwork describing mesothelioma either. [R.376: *Id.* at 10:12-11:4.]. Further, like Ratliff,

Smith was never informed by NS when he signed the early retirement release that it affected any personal injury claim he might later have. [R.375: *Id.* at 9:4-8]. In the 1990's, however, Smith retained a lawyer to present a lung disease claim against NS. [R.375: *Id.* at 7:11-24]. He settled his lung claim against NS; and notably, unlike the present instance, NS never maintained that Smith's 1987 early retirement "release" barred his claim. [R.375: *Id.* at 7:11-9:3].

Ratliff's widow, Freda Ratliff, filed this action seeking injury and wrongful death damages under the FELA on October 31, 2005; asserting negligence, violations of the Locomotive Inspection Act, and the Federal Safety Appliance Act. [R.001: Complaint at ¶ 1.] On November 28, 2005, NS filed its Answer, denying liability, but admitting that it is a Virginia corporation which maintains offices within West Virginia, and is a common carrier engaged in interstate commerce. [R.006: Answer at ¶ 3-5.] NS also admitted Ratliff's employment with the company. [R.007: Answer at ¶ 9.] Several depositions were conducted in discovery, including Sparrel Ratliff, NS corporate representative Marcellus Kirchner, and Harry Smith, a retired engineer and co-worker of Ratliff's. [R.374: *Smith Deposition* at 5:18-22.]

NS filed a motion for summary judgment on or about June 6, 2007 based on the early retirement agreement signed by Ratliff. The Appellant moved for cross-summary judgment under 45 U.S.C. § 55 on June 8, 2007, asserting that the broad release language was void.

During a June 15, 2007 hearing on the parties' respective motions the trial court stated that the release "haunts me" [R.199: Hearing on June, 15, 2007 at 8:11-21], adding "it's a very broad release and releases everything relating to the employment status." [R.199: *Id* at 8:14-15]. In response, counsel for NS asserted that "the reason that it's written broadly is because it was intended to cover everything." [R.207: *Id* at 16:16-17]. At that point, the trial court granted NS's motion for summary judgment, while preserving the objections of the Appellant. However,

the trial court noted: "I hope [the] Supreme Court takes it in and answers it and gets some bright line rule." [R.211: *Id* at 20:9-13]. Appellant's counsel immediately moved the trial court to alter its ruling and provide a jury trial on any preclusive effect of the release. [R.212: *Id* at 21:11-20]. The trial court agreed to a bifurcated jury trial, with the jury addressing the release issue first. [R.215-216: *Id* at 24:13-25:5].

Before the date for the bifurcated jury trial limited to release issue, NS and the Appellant moved the trial court to reconsider their respective cross motions for summary judgment, and a second hearing was held on July 20, 2007. [R.386: Hearing July 20, 2007 at 1]. NS asked the trial court to reconsider providing a jury trial on the effect of the release, whereas the Appellant moved the trial court to reconsider and enter summary judgment in her favor. [R.388: *Id* at 3:14-24] Ultimately, the trial court decided to enter summary judgment for NS. In doing so, the following discussion occurred:

> **The Court**: [T]he railroad didn't have any mistake in mind; they knew exactly what they were doing, even if the Plaintiff may have--doesn't make any difference?
> **Mr. Lafferre** [for NS]: That's correct.
> **The Court**: So, therefore, it's over.
> **Mr. Lafferre** [for NS] : And I would say, in addition to that, even if one considered that the Plaintiff might have had a mutual mistake, there's no evidence of that.

[R.390: *Id* at 5:12-22.]. The Appellant argued that the bifurcated jury trial was not "about [the] intent of NS." [R.392: *Id* at 7:5]. The Appellant argued that "under § 55 of the FELA, that, unless the parties discussed the risks and appreciated the risks, that there is no barring of an unknown FELA claim [; and here,] it is clear the parties did not discuss the nature of the risks [at the time of execution of the release]. [R.393: *Id* at 8:9-19]. The Appellant explained that there was simply no FELA decision construing § 55 which had upheld such a general release agreement, not arising from a claim or controversy. [*Id*] In response to the Appellant's position, the trial court stated: "[I]t is a broad--you might call it a boiler plate release. The fact that

nobody else has done it before, I don't know. I can't--I'm not going to--that really doesn't make any difference." [R.397: *Id* at 12:18-21]. The trial court then stated again its hope that the "Supreme Court will take a look at it--and should, and I think this is the case for them to do it." [R.398: *Id* at 13:13-14].

A final hearing took place on September 6, 2007, at which time the trial court denied the Appellant's request to certify the issue of the release to this Court, and heard argument over the language contained in the final order. On September 19, 2007, the trial court entered the final order drafted by NS, without modification. This appeal followed.

The following material facts are not in dispute: 1) the early retirement agreement release signed in 1986 was drafted by NS and offered to multiple NS workers; 2) Ratliff was unrepresented by counsel when he signed the 1986 release; 3) the release in question did not relate to any pending injury or disease claim known to the parties (nor discussed between the parties) in 1986, but arose from the offer of an early retirement separation plan to workers; 4) the release did not reference the FELA, personal injuries, or any specific injury or disease to be released, 5) Ratliff was not aware that asbestos was hazardous or toxic as of 1986; 6) Ratliff was not diagnosed with asbestos induced mesothelioma until 2005, 19 years after execution of the agreement, 7) NS asserts that its unambiguous purpose in obtaining the 1986 release was to prohibit any and all FELA claims which could have been asserted by Ratliff after the execution of the 1986 agreement, 8) NS paid $35,000.00 to Ratliff, all of which was taxed, and Ratliff accepted the offer of early retirement.

III. ASSIGNMENT OF ERROR

A. The Trial Court Erred In Ignoring 45 U.S.C. § 55, Which Voids the NS Release.

IV. DISCUSSION OF THE LAW

A. The Trial Court Erred In Ignoring 45 U.S.C. § 55, Which Voids the NS Release.

A-1. The Appropriate Standard of Review Is De Novo and Federal Law Controls.

Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is only appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Semple v. City of Moundsville*, 963 F. Supp. 1416, 1424 (N.D.W.Va. 1997); *See also, Painter v. Peavy*, 192 W. Va. 189,192, 451 S.E.2d 755, 758 (1994). In addition, the party seeking summary judgment bears the initial burden of showing the absence of any issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, (1986). Indeed, summary judgment "should be granted only in those cases where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979); citing *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950).

The standard of review relating to a grant of summary judgment is de novo. *McGraw v. Norfolk & Western Railway Co.*, 201 W.Va. 675, 500 S.E.2d 300 (1997); *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Also, when reviewing a grant of summary judgment, this Court must draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *McGraw v. Norfolk & Western Railway Co.*, 201 W.Va. 675, 500 S.E.2d 300 (1997); *Masinter v. WEBCO*, 164 W.Va. 241, 242, 262 S.E.2d 433, 435 (1980).

Pursuant to 45 U.S.C. § 56 (1948), federal and state courts have concurrent jurisdiction of claims brought under the FELA, 45 U.S.C. § 51. Substantive issues under the FELA are determined by the provisions of the federal statute and interpretative decisions of the FELA given by the federal courts. *Jenkins v. CSX*, 220 W. Va. 721, 649 S.E. 2d. 294, 298 n. 5 (2007); citing *McGraw*, supra. State courts, are bound by the federal courts' interpretation of the FELA. *McGraw*, 201 W.Va. at __ , 500 S.E.2d at 304. Indeed, the validity of a release in a FELA action is governed by federal rather than state law. *Maynard v. Durham S. Ry. Co.*, 365 U.S. 160, 161 (1961).

The trial Court simply ignored existing federal law which voids the subject release, as a matter of law, as to the Appellant's mesothelioma claims.

A-2. 45 U.S.C. § 55 Prohibits "Blanket" Release Agreements Exempting Railroads From FELA Liability For Future Claims.

The FELA makes common carrier railroads liable in damages to employees who suffer work-related injuries caused by the railroad's negligence. At the time of FELA's enactment, many railroads insisted on a contract with their employees, discharging the company from liability for personal injuries." *Damron v. Norfolk and Western Ry. Co.*. 925 F.Supp. 520, 523, (N.D. Ohio 1995) quoting *H.R. Rep. 1386, 60th Cong., 1st Sess. 6* (1908). Consequently, Congress enacted §55 to limit a railroad's ability to escape liability by using such contracts. It provides that:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . .

45 U.S.C. §55. The central issue presented by this case is whether 45 U.S.C. §55 prohibits NS from avoiding liability for the Appellant's FELA claims.

When considering the scope of the FELA, federal law requires courts to "look to FELA

itself, its purposes and background, and the construction [the US Supreme Court] has given it over the years." *Consolidated Rail Corporation v Gottshall*, 512 U.S. 532, 542 (1994). The statute abolished several common-law tort defenses, and importantly for this case, prohibited employers from exempting themselves from FELA through contract. *Id.* at 542-3.

Because of its midway position between a common-law action in negligence and a workers' compensation claim, a FELA case calls for an interpretive approach that is significantly different from that which ordinarily prevails in a suit for common law negligence. *CSX v. Miller*, 858 A.2d. 1025, 1037 (Md. App. 2004). The act is to be construed liberally to fulfill the purposes for which it was enacted. *Id.* at 143, 858 A.2d. at 1037. Accordingly, all issues relating to the interpretation of the NS early retirement agreement are governed by provisions of the FELA and federal law interpreting same.

A-3. It Is Undisputed that the Appellant's Mesothelioma Claim Accrued 19 Years After the Release's Execution, and Accordingly Was Not Known or Appreciated When the Release Was Signed.

The Appellant offered uncontradicted evidence that Ratliff was first diagnosed with mesothelioma cancer in 2005. [R.63-64: *Freda Ratliff Affidavit*]. The resignation agreement was signed in 1986. Ratliff had no disease, injury, or pending claim of any nature in 1986. [R.196: Hearing Transcript of June 15, 2007 at 5:3-5] In 1986, Ratliff was unaware that asbestos was even harmful or toxic. [R.251: *Ratliff Deposition I* at 23:10-24:2]

The U.S. Supreme Court, in describing mesothelioma, an asbestos induced cancer, recently stated: "One who has mesothelioma, in particular, faces agonizing, unremitting pain in the lungs, which spreads throughout the thoracic cavity as tumors expand and metastasize. The symptoms do not subside. Their severity increases, with death the only prospect for relief. And death is almost certain within a short time from the onset of mesothelioma." *Norfolk & Western*

Railway Co. v. Ayers, 538 US 135, 168 (2003) (Kennedy, concurring in part, dissenting in part) (internal citation omitted).

Much earlier, in *Urie v. Thompson*, 337 U.S. 163, 170-71 (1949) the Supreme Court held that when "the injurious consequences of the exposure are the product of a period of time rather than a point in time" the "afflicted employee" is injured only when "the accumulated effects of the deleterious substance manifest themselves" thereby setting forth the venerable rule that FELA disease claims do not accrue until manifestation. NS never asserted below that the claim accrued before Ratliff's actual diagnosis in 2005, so the material facts are undisputed showing that this appeal involves a "future accruing claim."

Federal law also follows what is now called the separate disease rule with regard to asbestos claims and mesothelioma cancer arising from asbestos. *See* e.g. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 153 (2003) (citing *Pustejovsky v. Rapid-American Corporation*, 35 S.W.3d 643, 653 (Tex. 2000); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 120-121 (D.C. Cir. 1982) (holding claim for mesothelioma is separate and distinct from claim for asbestosis). As the U.S. Supreme Court stated in *Ayers*:

> The rule evolved as a response to the special problem posed by latent-disease cases. Under the single action rule, a plaintiff who recovered for asbestosis would then be precluded from bringing suit for later developed mesothelioma. Allowing separate complaints for each disease, courts determined, properly balanced a defendant's interest in repose and a plaintiff's interest in recovering adequate compensation for negligently inflicted injuries. There is not inevitable conflict between the "separate disease rule" and recovery of cancer fear damages by asbestosis claimants. The rule simply allows recovery for successive diseases and would necessarily only exclude double recovery for the same elements of damages.

538 U.S. at 153, n. 12 (2003). Based on the "two disease rule" approved by the Supreme Court in *Ayers* a mesothelioma claim may accrue well after a separate asbestos claim, but more importantly here, because no asbestos disease claim of any nature had accrued by the time of the

execution of the separation agreement, the separation agreement was no bar to the mesothelioma claim which arose 19 years thereafter.

A-4. The U.S. Supreme Court, in *Callen*, Set Forth That an Underlying "Claim or Controversy" Must Exist For a Written FELA Release to Extinguish a Future Accruing Claim and The Undisputed Facts Show No "Claim or Controversy" Existed When the Release Was Signed.

The 1948 *Callen* case involved a general release (as opposed to an early retirement agreement) that included "all claims and demands which I have or can or may have against the said Pennsylvania Railroad Company." 332 U.S. 625, 626. The Court noted that the release was "not a device to exempt from liability but a means of compromising a claimed liability" and "where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." *Callen*, 332 U.S. at 631. Thus, the Supreme Court found that a release executed as part of a settlement for work-related injuries can survive application of 45 U.S.C. §55. *Babbitt v. Norfolk & Western RY. Co.*, 104 F 3d 89, 92 (6th Cir. 1997); *See also Boyd v. Grand Trunk Western R.R.*, 338 U.S. 263 (1949).

Proof that the U.S. Supreme Court did not intend to dilute the plain meaning of 45 USC § 55 came one year later in *Boyd v. Grand Trunk Western RR*, 338 U.S. 263 (1949). The railroad employee received advancements of money from the railroad on two occasions after his injury, and each advancement agreement included language that if his claim could not be settled, his suit could only be commenced in one of two jurisdictions in Michigan. The Supreme Court refused to enforce the agreement, holding it violated 45 USC § 55. The Court concluded that any other result would be inconsistent with its prior *Duncan* decision [315 U.S. 1 (1942)] because "Congress wanted [45 USC § 55] to have the full effect that its comprehensive phraseology implies." *Id.* at 265. The Court added that the "vigor and validity of the *Duncan* decision [a 1942 decision voiding a settlement as violative of § 55] was not impaired by *Callen*." *Id.* Thus,

even a release limitation on future *venue choices* for a FELA action violates § 55.

Two divergent lines of a federal court of appeal decisions have since emerged in the last two decades, both construing the scope of claims that may be validly released. *Babbitt v. Norfolk & Western Railway Company*, 104 F. 3d 89, 93 (6th Cir. 1997) established a bright line approach for reviewing such FELA release cases. The second line of cases follows *Wicker v. Consolidated Rail Corporation*, 142 F. 3d 690 (3rd Cir. 1998) which may be referred to as the "appreciation of the risk of harm" test. *See Anderson v. A.C. & S, Inc.*, 797 N.E. 2d 537 (Ohio App. 2003) (Discussing the *Wicker* and *Babbitt* line of cases, the court held that Conrail's broad release language was clearly not a bargained for settlement only of an asbestosis claim since the release went well beyond merely compromising a claimed liability and impermissibly purported to exempt the railroad from all potential future claims known or unknown. Applying § 55 of the FELA, the court found the purported release did not bar a mesothelioma claim arising 12 years later). However, either or both of the two approaches reveal that the trial court below committed reversible error – both *Babbitt* and *Wicker*, relying on *Callen*, expressly observed that a release must arise from a *claim or controversy*. Here, the uncontradicted evidence shows that the release was a part of an early retirement agreement, not a general release of an injury or disease claim. *Anderson supra*, provides overwhelmingly strong support for the Appellant, since the suspect release actually arose from a negotiated asbestosis disease settlement – but the mesothelioma claim accrued 12 years later. Accord *Damron*, 925 F. Supp. 520, 527 (N&W early retirement release violated 45 U.S.C. § 55, because release is not procured pursuant to compromise of a claimed liability); *Fannin v. Norfolk & Western Ry Co.*, 666 N. E. 2d 291 (Ohio App. 1995) (voiding seven N&W resignation releases under § 55 of the FELA, the court found that while one may contract to settle or waive actual FELA claims, one may not contract to waive all FELA

rights with respect to claims which have not yet arisen).

In *Babbitt* and *Wicker* (both incidentally involving NS or its subsidiary rail lines), the courts either voided the underlying releases or noted the releases were void if not arising *from a specific injury release.* *Wicker*, 142 F. 3d at 702 ("[W]e find the releases signed by the parties violate § 5 [45 USC § 55] because they purport to settle all claims regardless of whether the parties knew of the potential risks"); *Babbitt*, 104 F. 3d. at 93 (Reversing summary judgment for NS, and remanding the case to ascertain whether the release was executed as part of a settlement for damages sustained as a result of the Plaintiffs' specific injuries, the court noted: "[W]e note that the release cannot serve as a bar to the Plaintiff's claims under FELA unless the release was clearly executed as a settlement for their hearing loss injuries"). The Appellant provided the trial court with the *Babbitt* and *Wicker* decisions because under either analysis, the Appellant was entitled to summary judgment. Unfortunately, the trial court ignored these decisions.

In *Wicker*, the Third Circuit Court of Appeal stated:

> We hold that a release does not violate §5 [45 U.S.C.§ 55] provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed. Claims relating to unknown risks do not constitute "controversies," and may not be waived under § 5 of FELA. *See Callen*, 332 U.S. at 631, 68 S. Ct. at 298-99. For this reason, a release that spells out the quantity, location and duration of potential risks to which the employee has been exposed--for example toxic exposure--allowing the employee to make a reasoned decision whether to release the employer from liability for future injuries of specifically known risks does not violate § 5 of FELA.

Wicker 142 F. 3d at 701. While each of the five worker releases involved in *Wicker*, unlike the present instance, were negotiated *injury* releases, and each worker *already had symptoms* of toxic chemical exposures (trichloroethylene) when such releases were signed, the *Wicker* Court nevertheless noted:

> Conrail contends that even if the releases apply only to injuries plaintiffs were aware of at the time they signed the releases, their claims here are still barred because they had knowledge of at least some of their symptoms. Although plaintiffs testified they were aware of certain symptoms when they signed the releases, the record does not demonstrate that they knew that these symptoms were related to their exposure to toxic chemicals at Conrail's plant. To the contrary, plaintiffs testified they did not connect the symptoms with their chemical exposure until after they had signed the releases, and that they were not aware of the risks associated with the various chemicals used at Conrail's facility. Therefore, the releases could not have settled claims with respect to those risks, and cannot bar plaintiffs' claims.

Id. at 702. (Emphasis supplied). Despite the *Wicker* "policy holding" that a negotiated release might not foreclose certain "future arising" claims, the *Wicker* court held as a matter of law that the releases did not bar the Plaintiff's new FELA toxic exposure claims because the releases each purported to settle all claims regardless of whether the parties knew of the potential risks. Thus, it's noteworthy that in the present instance, NS's corporate representative Kirchner conceded in his deposition that the subject NS release never mentions FELA, personal injury, asbestos, mesothelioma, and no writings disclosed the risks or dangers of asbestos exposure.

In *Wicker*, Conrail tried to *distinguish* *Babbitt* (*Babbitt* also involved NS and similar "resignation and release" agreements as the one executed here by the Appellant's decedent) by offering that the releases questioned in *Babbitt* were "resignation and release" agreements, and *not* injury releases. *Babbitt*, 104 F.3d at 699. This argument failed to persuade the court because the questioned releases did not apply to any pending claim or controversy.

Here, the trial court relied on *Gortney v. Norfolk & Western Ry. Co.*, 549 N.W. 2d 612 (Mich. App. Ct. 1996) which upheld a similar NS "resignation release" with broad release language. However, *Gortney*, a state court decision, was decided within the geographical area of the Sixth Circuit a year before the *Babbitt* decision was handed down. More importantly, the *Gortney* decision emphasized that 45 U.S.C. § 55 was ***NOT*** before the court on appeal, as it had

been waived. As such, the case offers no precedential value. In this case, applying this early retirement agreement as a bar to the Appellant's FELA action violates 45 U.S.C. § 55. There was no underlying claim, nor even any mention of mesothelioma or FELA claims when the early retirement agreement was signed. Evaluating NS's "intent"– whether virtuous or conspiratorial – is simply irrelevant.

The release defense issues raised here by NS were also recently addressed by the Supreme Court of Mississippi, and were soundly rejected. *See* Illinois Central R.R. Co. v. McDaniel, et al., 951 So.2d 523, 532 (Miss. 2006) *cert. denied* __U.S.__ (2007).

In McDaniel, the plaintiff suffered a career ending back injury in 1998 while employed by the Illinois Central Railroad. Illinois Central R.R. Co. v. McDaniel, 951 So.2d at 530. McDaniel and the ICRR subsequently settled his claim for the back injury suffered and McDaniel signed a document titled Final Settlement Release and Agreement Not to Return to Work. *Id.* The language of this document purportedly released ICRR for a variety of ailments/diseases, including exposure to asbestos. *Id.* Although McDaniel was x-rayed one month prior to signing the release, he was not diagnosed with asbestosis until several months after he signed the release. The ICRR argued that McDaniel personally released his asbestos claim by signing an occupational injury release, thereby releasing all personal injury claims he had against the ICRR. Despite the fact that McDaniel had been x-rayed prior to the release being executed, the Supreme Court of Mississippi rejected ICRR's arguments and held:

> In the case presently before this Court, the only known injury at the time McDaniel signed the release was the severe back injury he suffered as a result of a defective hand brake. Although McDaniel was x-rayed one month prior to signing ICRR's release form, the x-ray was not read until several months after he signed the release. **Furthermore, there is no evidence McDaniel was aware he may have a potential asbestos-related injury**. Therefore, in accordance with the Sixth Circuit's view [*Babbitt v. Norfolk & Western Ry. Co.*, 104 F.3d 89, 93 (6th Cir. 1997)], the release McDaniel signed would not

bar him from settlement.

* * *

The release McDaniel signed as a result of an on the job injury settlement, covered a vast and extensive spectrum of potential injuries which could potentially arise in McDaniel's future. . . . The language found in the McDaniel release is **clearly an overbroad list of generic hazards**, rather than the specific risks of asbestos McDaniel faced. Therefore, pursuant to the Third Circuit's [*Wicker v. Consolidated Rail Corp.*, 142 F.3d 690, 701 (3rd Cir. 1998)] school of thought McDaniel's release would not pass muster under § 5 of FELA.

* * *

After due consideration, this Court finds the holdings of the Sixth and Third Circuits are compelling authority as applied to this case. Further, **after applying the holdings of both the Sixth and Third Circuits, we find McDaniel's release was ineffective under § 5 of FELA** to preclude his claim against ICRR for asbestos related injuries; to hold otherwise would produce an unconscionable result. Therefore, the circuit court did not abuse its discretion in finding McDaniel's release ineffective in this case. Thus, **McDaniel's claim should not be released**.

Illinois Central R.R. Co. v. McDaniel, et al., 951 So.2d 523, 530-32 (Miss. 2006), cert. denied 127 S.Ct. 1332 (2007) (emphasis supplied, citations added).

Several months after the *McDaniel* decision by the Mississippi Supreme Court, the same state Supreme Court handed down another decision relating to FELA release law mainly dealing with asbestos claims, also involving ICRR, and again the U.S. Supreme Court denied certiorari. *Acuff, et al v. ICRR Co.*, 950 So.2d. 947 (Miss. 2006), reh'g. denied 950 So.2d. 950 (2006), cert. denied, __U.S.__ (2007).

In *Acuff*, numerous claims were reviewed by a state circuit judge, as to facts and law, including ICRR FELA release defenses similar to those of NS in this case, as ICRR contended that prior releases barred the current asbestos claims. 950 So.2d at 956-57. ICRR argued that asbestos was a "known risk" because it was mentioned in the release, but the court noted that this "does not address the question of whether the employee ever actually contemplated having the illness or injury being released." *Id.* at 960. Referring to the mention of the word "asbestos" in

the questioned release, the *Acuff* court held that "[c]learly, more is required for a risk to be considered "known," referring favorably to the Third Circuit *Wicker* case language noting that "a release that spells out the quantity, location and duration of potential risks to which an employee has been exposed" will not violate section 55 of the FELA. Id.

Mr. Ratliff could not release a mesothelioma FELA claim since it was not known to him at the time he executed the release in question. *See Babbitt v. Norfolk & Western Ry. Co.*, 104 F.3d 89, 93 (6th Cir. 1997). Indeed, such a claim was not even contemplated by the parties. Moreover, it is apparent that the NS separation agreement release language regarding "any claim or right asserted under or arising out of any agreement, regulation, condition or statute.... covering the conditions of my employment" constitutes nothing more than a blanket of immunity regarding any FELA claims that might arise. *See Wicker v. Consolidated Rail Corp.*, 142 F.3d 690, 701 (3rd Cir. 1998). Accordingly, the release in question is ineffective under section 55 of FELA to preclude Ratliff's claim against NS for his future accruing mesothelioma claims. *See Wicker*, 142 F.3d at 701; *Babbitt v. Norfolk & Western Ry. Co.*, 104 F.3d 89, 93 (6th Cir. 1997); *Acuff, et al v. ICRR Co.*, 950 So.2d. 947 (Miss. 2006), reh'g. denied 950 So.2d. 950 (2006), cert. denied, __U.S.__ (2007); *Illinois Central R.R. Co. v. McDaniel, et al.*, 951 So.2d. 523, 530-32 (Miss. 2006), cert. denied __U.S.__ (2007).

The recent *Jaqua v. Canadian National RR, Inc., d/b/a/ Grand Trunk Western RR.*, N.W. 2d 228 (Mich. App. 2007) decision further reaffirms the Appellant's position regarding the interpretation of *Callen*:

> A release does not violate sec. [§ 55] provided it is executed . . . as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed.
>
> * * *
>
> Any intention to prevent a claim unrelated to the one compromised

> would be void under [45 U.S.C. 55]. However, courts have specifically allowed a release to compromise a specific claim or claims, and to prevent reassertion of that claim at a later date....While this court agrees that the *Babbitt* approach's bright line test may be easier to apply to a particular claim, its adoption would prevent any compromise to be made for such damages items as "fear of cancer" or "risks of permanency" despite the fact that the parties may intend for the compromise to specifically cover those items of damage.
>
> * * *
>
> For these reason, the *Wicker* approach is the better approach. It permits the enforcement of the release of not only the specific injuries already manifested at the time of its execution, but also any risks of future injury which the parties specifically contemplated in its execution, so long as those risks are properly within the ambit of the claim compromised. This approach provides a realistic view of compromises and releases, while staying true to the prohibition on blanket relinquishments of rights under FELA.

Jaqua, 734 N.W. 2d at 236.

Wicker, *Babbitt*, *Acuff*, *McDaniel*, *Anderson*, *Fannin* and *Jaqua*, all interpret *Callen* with clarity: the release must arise from a claim or controversy, must spell out the risks to be released and the parties must appreciate the nature of the claim to be released. NS's argument has been repeatedly and consistently rejected. Here, there was no dispute or controversy, but a reduction in work force agreement, which never lists either "injury claims" or "FELA claims". Further, it is undisputed that the Decedent never knew he had contracted cancer/mesothelioma until 2005. Accordingly, § 55 of the FELA voids the release as to the Appellant's mesothelioma claims.

While the trial court correctly noted that this petition presents a matter of first impression for this Court [R.398: Hearing of July 20, 2007 at 13:13-14] the issue is *not* novel to federal courts of appeal or to NS or its subsidiary railroads. *See*, eg. *Wicker* and *Babbitt*.

Though federal law governs the effect of FELA releases, the trial court below simply ignored *Callen's* "claim or controversy" requirement, as well as the two divergent line of cases construing *Callen* and § 55 (the *Wicker*/3rd Circuit line of cases and the *Babbitt*/6th Circuit line of

cases), and instead followed the questionable and inapplicable state court decision in Gortney. Again, Gortney did not consider or construe 45 U.S.C. § 55 because § 55 was waived by the worker for appeal consideration purposes. 549 N.W. 2d at 616. It was also decided one year before Babbit. In addition to Gortney, NS also directed the trial court to several other unpublished slip opinions of various lower courts, involving lower court decisions not tested on appeal. NS cited no federal case on point, and never adequately explained how the trial court could avoid § 55.

The central position of NS was that the "intent" of the railroad was to bar and prohibit all future accruing claims [R.199: Hearing on June 15, 2007 at 8:14-15; and R.207: at 16:16-17]. However, NS's "intent" supports voiding the release as violative of 45 U.S.C. § 55.

In Anderson, the court reviewed the divergent Babbit and Wicker line of cases, and other § 55 decisions, and found:

> Appellees [railroads] argue, however, that Babbit and Fannin are not relevant to the release signed by *Anderson* because they involve releases signed in connection with a buy-out from the company, rather than the settlement of litigation. We are not persuaded. [*Anderson's* release did involve a negotiated settlement]. Although factually the cases may differ, the principle announced in each is the same: under FELA, a release is valid only where it disposes of an accrued claim for a known injury.

797 N.W. 2d at 544. Accordingly, the Anderson court found the release void under § 55 even though it arose from a *negotiated injury settlement*, and even though in that particular case the claimant was aware of the risk of developing mesothelioma or other lung cancer as a result of his occupational exposure to asbestos. *Id.*

V. CONCLUSION – RELIEF REQUESTED

The FELA is a railroad worker's exclusive compensation remedy for occupational injuries / illnesses or death claims against a rail employer. Congress imposed a special statutory prohibition on railroad releases of future accruing liability under the FELA, and the statute governs the issue here.

WHEREFORE, for all of the foregoing reasons, the Appellant respectfully requests the Court reverse summary judgment for NS, hold that the release violates 45 USC § 55 and is void as to the Appellant's mesothelioma claims.

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CERTIFICATE OF SERVICE

Service of the foregoing was had by mailing a true copy thereof, by First Class Mail, postage prepaid, on this 4th day of September, 2008, to the following persons and/or parties of record:

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